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# Real Rights of Noncompetition: Louisiana Public Policy and the Civil Tradition

Alex Hotard

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# Real Rights of Noncompetition: Louisiana Public Policy and the Civil Tradition

## INTRODUCTION

In 1985, James and Catherine Olinde, co-owners of a ten-acre tract of land, decided to open a restaurant.<sup>1</sup> They set aside four acres for their new enterprise, Ralph & Kacoo's Restaurant, and planned to sell the remainder.<sup>2</sup> The Olindes understood, however, that when any business sells land there is a risk that it will fall into a competitor's hands.<sup>3</sup> The couple protected themselves from this risk by including a noncompetition clause in their act of sale: the land was sold to Anthony Diez on the condition that it could not be used for the operation of a seafood restaurant until 60 months after the sale.<sup>4</sup> Shortly after the sale, Mr. Diez leased his new land to a third party who promptly opened a seafood restaurant, and the Olindes brought suit.<sup>5</sup> This seemingly simple contract dispute belies a labyrinth of jurisprudence, doctrine, and law, all surrounding Louisiana's real rights of noncompetition.

States universally recognize and regulate noncompetition agreements to balance the needs of business with the needs of the public.<sup>6</sup> The arrangements can take a direct approach by restraining a person from participating in commerce<sup>7</sup> or an indirect approach by restraining the commercial use of a particular property.<sup>8</sup> The latter approach often arises in lease agreements or sales of land.<sup>9</sup> In many states, the breach of these land-restricting agreements will give rise to action against not only the owner who made the agreement, but also any lessees or subsequent

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1. R & K Bluebonnet, Inc. v. Patout's of Baton Rouge, Inc., 521 So. 2d 634, 635 (La. Ct. App. 1988).

2. *Id.*

3. *Id.*

4. *Id.*

5. *Id.*

6. *E.g.*, LA. REV. STAT. § 23:921 (2017); MONT. CODE ANN. § 28-2-703 (2017); TEX. BUS. & COM. CODE ANN. § 15.50 (West 2015).

7. LA. REV. STAT. § 23:921 (permitting such agreements within certain constraints).

8. Mark S. Dennison, *Lessee's Enforcement of Covenant Prohibiting Lessor's Use or Lease of Other Premises for Use in Competition With Lessee's Business*, in 95 AM. JUR. PROOF OF FACTS 467, 476 (2007).

9. *Id.*

purchasers of the affected property.<sup>10</sup> In Louisiana, however, it is not so easy to enforce these land-restricting noncompetition agreements against third parties.<sup>11</sup>

This difference is due to Louisiana's division of rights and their corresponding obligations into two categories: real and personal.<sup>12</sup> Only real rights, such as the right of ownership,<sup>13</sup> follow property and can be enforced against all third parties.<sup>14</sup> Personal rights, such as the right to collect payment, follow persons and can only be enforced against third parties who have explicitly agreed to assume the obligation.<sup>15</sup> The distinction between real and personal rights is important for businesses seeking to limit the use of property because it is far more effective to bind everyone who might ever be associated with the property than to bind only the current owner of the property.<sup>16</sup> Savvy businesses, such as Ralph & Kacoo's Restaurant,<sup>17</sup> will therefore attempt to create "real rights of noncompetition"<sup>18</sup> in their land-use-restricting contracts.

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10. See *Winn-Dixie Stores, Inc. v. Dolgencorp, LLC*, 746 F.3d 1008, 1026 (11th Cir. 2014) (finding lease agreements between the plaintiff and various lessors in Florida that limited the space other tenants could use for the sale of groceries created rights that were enforceable against co-tenants).

11. See, e.g., *id.* Winn Dixie sued to enforce lease agreements prohibiting competition across several states. *Id.* Winn Dixie's contracts were enforceable against its fellow lessors in Florida, but they were not enforceable against third parties in Louisiana because of Louisiana's distinction between real and personal obligations. *Id.* at 1031.

12. See LA. CIV. CODE art. 1763 cmt. b (2017) (stating that a real right is a right enforceable against the whole world rather than against a single person); *id.* art. 1763 (defining real obligations as those incidental to real rights). The terms "personal right" and "personal obligation" are not defined explicitly in the Code, but they refer to those civil rights and obligations that are not "real rights" or "real obligations." See, e.g., *id.* art. 734 cmt. b; *id.* art. 1764 (establishing that personal obligations are transferred only by explicit assumption of the personal obligation by an obligor's successor).

13. *Id.* art. 476 cmt. b.

14. *Id.* art. 1763 cmt. b (stating that a real right is a right enforceable against the whole world rather than against a single person); *id.* art. 1764 (establishing that real rights are transferred by transfer of an associated property).

15. See *id.* arts. 1764, 1821–1823; *id.* art. 1764 cmt. d.

16. This Louisiana quirk has already caused problems for at least one unwary business. See *Winn-Dixie*, 746 F.3d at 1031.

17. *R & K Bluebonnet, Inc. v. Patout's of Baton Rouge, Inc.*, 521 So. 2d 634, 635 (La. Ct. App. 1988). See also *Meadowcrest Ctr. v. Tenet Health Sys. Hosps., Inc.*, 902 So. 2d 512, 514 (La. Ct. App. 2005).

18. Because Louisiana calls any rights that run with property and affect third parties "real rights," see LA. CIV. CODE art. 1763 cmt. b; *id.* art. 1764, the term

The Louisiana Supreme Court has affirmed that land-restricting noncompetition agreements can create personal rights and obligations,<sup>19</sup> but the Court has yet to address whether parties can create real rights of noncompetition.<sup>20</sup> Other Louisiana courts have generally upheld real rights of noncompetition in the form of predial servitudes,<sup>21</sup> but these decisions rest on cursory legal analyses that gloss over the essential elements of predial servitudes.<sup>22</sup>

Predial servitudes that restrict trade can provide protection to businesses and encourage the sale of property, but there are two major obstacles to court enforcement of these servitudes. First, most predial servitudes of noncompetition are theoretically unsound under the Louisiana Civil Code and civil law doctrine.<sup>23</sup> Second, these arrangements can permanently remove property from trade,<sup>24</sup> even to the point that businesses might purchase their own regional monopolies given enough wealth.<sup>25</sup> If the Louisiana legislature approves of real rights of noncompetition, there must be legislation to authorize and regulate them.<sup>26</sup>

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“real right of noncompetition” is a fitting description for the rights and obligations discussed in this Comment. For reasons established in Part I of this Comment, this term is interchangeable with “predial servitude of noncompetition.” *See infra* Part I.

19. *See, e.g.*, *Leonard v. Lavigne*, 162 So. 2d 341, 343 (La. 1964).

20. A. N. YIANNPOULOS, *PREDIAL SERVITUDES* § 6:5, *in* 4 LOUISIANA CIVIL LAW TREATISE 357 (4th ed. 2013).

21. *E.g.*, *Richard v. Broussard*, 378 So. 2d 959, 968 (La. Ct. App. 1979); *R & K Bluebonnet*, 521 So. 2d at 635.

22. *See infra* Parts II.B.1., III.B.

23. *See infra* Part III.A.

24. *See infra* Part III.B; *see also* *Meadowcrest Ctr. v. Tenet Health Sys. Hosps., Inc.*, 902 So. 2d 512, 514 (La. Ct. App. 2005).

25. *See* LA. CIV. CODE art. 697 (2017) (establishing that parties can contract to create predial servitudes upon their land or to benefit their land). Unless specifically excluded, things, including incorporeal property rights, may be bought and sold in Louisiana through contracts of sale. *Id.* art. 2448. Money, sometimes called wealth, can be used to purchase things in a contract of sale. *Money*, BLACK’S LAW DICTIONARY 1096 (9th ed. 2009); LA. CIV. CODE arts. 2448, 2464. No language in article 697 or any other code article prohibits parties from granting predial servitudes on their property in exchange for money in a contract of sale. It follows that persons with sufficient wealth could purchase a large number of servitudes that restrict competition. A glut of servitudes precluding trade, all located within an area and benefitting the same estate, would make the owner of the dominant estate the only person who could operate a particular business in that area.

26. *See infra* Part IV.

This Comment explores the enforceability of real rights of noncompetition in Louisiana. Part I provides background on Louisiana real rights and personal obligations. Part II examines how Louisiana courts have embraced certain real rights of noncompetition. Part III argues that Louisiana's enthusiastic acceptance of these rights oversimplifies the law of real rights and ignores important public policy concerns. Part IV proposes a legislative solution to these problems and attempts to reconcile legitimate business interests with the best interests of the state.

### I. LOUISIANA RIGHTS: REAL AND PERSONAL

Louisiana divides obligations and rights into two categories: real and personal.<sup>27</sup> A real right attaches to a piece of property and grants direct authority over the thing;<sup>28</sup> this authority can be enforced or asserted against any and all persons in the world.<sup>29</sup> Because the real right is attached to property, it is automatically transferred to a successor in interest to the property.<sup>30</sup> In contrast, a personal obligation conveys authority over one or more persons, the obligors,<sup>31</sup> and the obligation may only ever be enforced or asserted against the obligors themselves.<sup>32</sup> The transferability

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27. See LA. CIV. CODE art. 1763 (defining real obligations as those incidental to real rights); *id.* art. 1763 cmt. b (stating that a real right is a right enforceable against the whole world rather than against a single person); *id.* art. 1764 (establishing that real rights are transferred by transfer of an associated property where personal obligations are transferred only by assumption of the personal obligation by a successor).

28. *Id.* art. 1764; *id.* art. 476 cmt. b.

29. *Id.* art. 1763 cmt. b.

30. *Id.* art. 1764.

31. *Id.* art. 1756. See also *id.* art. 476 cmt. b. The law distinguishes between real rights that attach to property directly and personal rights that require an obligor to grant a right holder access to a thing under the obligor's control. *Id.* The latter arrangement perfectly describes lease agreements, which create personal rights and obligations under Louisiana law. See *Richard v. Hall*, 874 So. 2d 131, 145 (La. 2004) (citing A. N. YIANNOPOULOS, PROPERTY § 226, in 2 LOUISIANA CIVIL LAW TREATISE 435 (4th ed. 2001)).

32. *SPE FO Holdings, LLC v. Retif Oil & Fuel, LLC*, No. 07-3779, 2008 WL 754716, at \*2 (E.D. La. Mar. 19, 2008). This rule holds true even when the obligor has some control over interested third parties, such as with an obligor lessor and the obligor's third-party lessees. See LA. CIV. CODE art. 1977; see also, e.g., *Winn-Dixie Stores, Inc. v. Dolgencorp, LLC*, 746 F.3d 1031 (11th Cir. 2014) (*Winn Dixie*, as lessee, contracted for the exclusive right to sell groceries in its lessor's strip mall; this right could be asserted against the lessor but not against

of a personal obligation depends on whether the obligation is considered heritable or strictly personal.<sup>33</sup>

Real rights are subdivided into ownership, predial servitudes, personal servitudes, and “other real rights.”<sup>34</sup> The concept of ownership is straightforward, and an owner ordinarily need not fear that his own property will be used in competition against him.<sup>35</sup> The “other real rights” category is rarely employed in legal practice, and arguments that noncompetition agreements fall into this category have consistently failed.<sup>36</sup> When businesses in Louisiana assert the existence of real rights of noncompetition, the courts focus on servitudes and confine their

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the lessor’s other lessees when these other lessees began selling groceries in the strip mall.).

33. LA. CIV. CODE art. 1764. If a personal obligation or right is strictly personal, it cannot be transferred. *Id.* art. 1766. If a personal obligation or right is heritable, it may be transferred to a successor by assumption of obligations, assignment of rights, or whatever other means the law allows. *See id.* art. 1765.

34. *Id.* art. 476.

35. Ownership is the right of direct, immediate, and exclusive authority of a thing. *Id.* art. 477. Ownership conveys full authority to use a thing, which is usus; to acquire its fruits, which is fructus, and to dispose of it, which is abusus. *Id.* It follows that a person who owns a thing—and thus controls its use—need not fear that the thing will be used in competition against the owner unless the owner sells or leases the property to another person. In the event of lease, a noncompetition agreement between lessor and lessee might be drafted, but the law will treat the noncompetition arrangement as a personal obligation between lessor and lessee, not a real right. *See, e.g.,* Leonard v. Lavigne, 162 So. 2d 341, 343 (La. 1964).

36. LA. CIV. CODE art. 476 cmt. d. Louisiana “building restrictions,” described in articles 775 through 783, likely fall into this “other” category. Because of the strict requirements for their existence, which are rarely met, building restrictions are relevant to the current discussion only because parties have repeatedly and unsuccessfully classified their noncompetition arrangements as building restrictions to create real rights. *See, e.g.,* Richard v. Broussard, 378 So. 2d 959, 968 (La. Ct. App. 1979) (determining that an agreement not to use property for a commercial purpose created a predial servitude but not a building restriction); R & K Bluebonnet, Inc. v. Patout’s of Baton Rouge, Inc., 521 So. 2d 634, 635 (La. Ct. App. 1988) (holding that an agreement not to use a property to operate a seafood restaurant in competition with seller of land created a predial servitude and not a building restriction). *C.f.,* McGuffy v. Weil, 125 So. 2d 154, 158 (La. 1960) (decided before codification of building restriction laws and holding that an agreement to use newly purchased property for only residential purposes created only an unclassified servitude and was enforceable as a real right).

analysis there.<sup>37</sup> It follows that predial and personal servitudes are the most relevant areas of law for real rights of noncompetition.

### A. Predial Servitude

A predial servitude is a charge on one estate, the servient estate, for the benefit of another, the dominant estate.<sup>38</sup> The predial servitude has three elements: (1) two separately owned estates; (2) a charge on the servient estate; (3) for the benefit of the dominant estate.<sup>39</sup>

First, a predial servitude requires both a dominant and a servient estate, each separate and distinct from the other;<sup>40</sup> for no owner may impose a predial servitude on a single estate for its own benefit.<sup>41</sup> It is not enough for two estates to be separate from each other in location alone—the estates must be owned by separate parties.<sup>42</sup> A predial servitude will be extinguished if a single person comes to own both the servient and dominant estates.<sup>43</sup>

Second, a predial servitude requires a charge on the servient estate that burdens the owner in some capacity.<sup>44</sup> However, the owner of a servient estate is generally not required to personally do anything on his estate; instead, his obligation is to abstain from doing something on his estate or to permit something to be done on it.<sup>45</sup> Whether the owner refrains from action or permits action determines the sort of predial servitude created: affirmative or negative.<sup>46</sup> A predial servitude is affirmative if it gives the dominant estate owner the right to take action on the servient estate, such as the right to pass through, to lay pipe, or to use a wall for support.<sup>47</sup> A predial servitude is negative if it obligates the servient estate owner to

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37. See, e.g., *Richard*, 378 So. 2d at 968; *R & K Bluebonnet*, 521 So. 2d at 635.

38. LA. CIV. CODE art. 646.

39. Notably, no element of proximity exists. The separate estates may be any distance apart as long as they are close enough that the dominant estate can derive some benefit from the servient estate. *Id.* art. 648.

40. *Id.* art. 646.

41. *Id.* art. 646 cmt. f. This general principle assumes that a single person owns both estates; an estate over which one person has co-ownership might still be in a predial servitude with another estate owned in full or in part by the same person. *Id.*

42. *Id.* art. 646.

43. *Id.* art. 765 (establishing that a servitude is automatically extinguished if one person acquires ownership of both estates simultaneously).

44. *Id.* art. 646.

45. *Id.* art. 651.

46. *Id.* art. 706.

47. *Id.*

refrain from doing something on his own estate such as a prohibition against building a dam to stop drainage.<sup>48</sup>

Third, the charge on the servient estate must exist for the benefit of the dominant estate.<sup>49</sup> This requirement, known as the principle of utility,<sup>50</sup> limits predial servitudes to charges that can reasonably be expected to benefit the dominant estate.<sup>51</sup> A valid predial servitude will encumber the servient estate for the benefit of the person who, at any given time, owns the dominant estate.<sup>52</sup> A predial servitude is inseparable from the dominant estate and will pass with it when the property is sold or donated to another person; similarly, the charges on a servient estate will pass with the land to any future owners.<sup>53</sup> This principle is in accordance with the general requirement that real rights and obligations automatically transfer to a person who acquires the movable or immovable thing to which the right or obligation is attached.<sup>54</sup>

#### *B. Personal Servitude*

A personal servitude is a charge on a thing for the benefit of a person, the beneficiary.<sup>55</sup> Personal servitudes are subdivided into usufruct, habitation, and right of use.<sup>56</sup> The right of use, sometimes called a “limited personal servitude,” confers upon a person some specified use of an estate less than full enjoyment; the conferred advantage must be one that could be established by a predial servitude.<sup>57</sup> The limited personal servitude is frequently compared to the predial servitude<sup>58</sup> and is governed by the same

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48. *Id.*

49. *Id.* art. 647.

50. *Id.* art. 647 cmt. b.

51. *Id.* art. 647.

52. *Id.* art. 647 cmt. c.

53. *Id.* art. 650.

54. *Id.* art. 1764.

55. *Id.* art. 534.

56. The personal servitudes permitted by the Civil Code include usufruct (where the beneficiary enjoys the use and fruits of a thing), *id.* arts. 538–539; habitation (where the beneficiary enjoys the right to live in the home of another), *id.* art. 647; and right of use (where the beneficiary enjoys the use of an estate whether in part or in whole), *id.* art. 639. Of these, habitation and usufruct are irrelevant to noncompetition agreements because they do not place charges on an estate for the benefit of someone other than an inhabitant or possessor respectively.

57. *Id.* arts. 639–640; *id.* art. 639 cmt. c.

58. See, e.g., *Ritter v. Commonwealth Land Title Ins. Co.*, No. 12 CA 1654, 2013 WL 4080914, at \*3 (La. Ct. App. Aug. 13, 2013), *writ denied*, 130 So. 3d



laws as predial servitudes wherever the rules are applicable.<sup>59</sup> Like a predial servitude, a limited personal servitude is a real right and will continue to burden the servient estate even if that property is transferred.<sup>60</sup> The key distinction is that the beneficiary of a limited personal servitude is a person rather than a separate estate.<sup>61</sup> The beneficiary does not automatically transfer the real right when he transfers his own property; instead, the right attaches to his person and follows him until he transfers the right to his heirs or successors.<sup>62</sup> A personal servitude, like a predial servitude, is heritable, but it is transferred separately from the beneficiary's estate.<sup>63</sup>

The personal and predial servitude are also distinguished by the nature of the obligations that can be imposed on the servient estate owner. A predial servitude may require the owner of a servient estate either to refrain from taking certain actions on the servient estate or to permit certain actions on the servient estate by the owner of the dominant estate.<sup>64</sup> A limited personal servitude, however, encompasses only those arrangements where the

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945 (La. 2014) (“[A] personal servitude is a charge on a thing for the benefit of a person, while a predial servitude is a charge on an estate expressly for the benefit of another estate.”); LA. CIV. CODE art. 639 cmt. b (“The personal servitude of right of use confers advantages less than full enjoyment of an estate. In this respect, it resembles a predial servitude.”).

59. LA. CIV. CODE art. 645.

60. *Id.*; see also *id.* art. 650. Personal servitudes are governed by the law of predial servitudes where applicable, and so personal servitudes are subject to the same limitations of inseparability from the servient estate as predial servitudes with the distinction that a person, instead of a dominant estate, benefits from the burden that follows the servient estate. *Id.*

61. *Id.* arts. 534, 639, 646; *Richard v. Hall*, 874 So. 2d 131, 145 (La. 2004) (“[T]he qualification of a servitude as ‘personal’ indicates that the servitude is in favor of a person rather than an estate.” (citing A. N. YIANNOPOULOS, PERSONAL SERVITUDES § 223, in 3 LOUISIANA CIVIL LAW TREATISE (4th ed. 2000))).

62. *Richard*, 874 So. 2d at 145. “One practical distinction between the two kinds of servitudes is that predial servitudes pass with transfers of the servient estate while personal servitudes do not inure to the benefit of transferees of the land owned by the person in whose favor the servitude was established.” *Guillotte v. Wells*, 485 So. 2d 187, 189 (La. Ct. App. 1986).

63. LA. CIV. CODE arts. 643–644. This quality of separate transfer will not necessarily make the duration of a personal servitude longer or shorter than that of a predial servitude; either might be extinguished by convention, by destruction of the servient estate, or by prescription for nonuse by the beneficiary. See *id.* arts. 645, 751, 753, 771, 773. A servitude of either sort will also be extinguished by the dissolution of the right of the person who initially granted the servitude. *Id.* art. 774.

64. *Id.* art. 651.

servient estate owner is required to permit actions by the beneficiary.<sup>65</sup> Indeed, courts have not interpreted agreements that obligate landowners not to do something on their estate or not to build something on their estate as limited personal servitudes.<sup>66</sup> Instead, any attempt to bind a landowner not to use his property in a particular manner for the benefit of a person rather than an estate will create only a personal obligation, not a real obligation.<sup>67</sup>

### C. Personal Obligations

If parties are unable or unwilling to establish real rights of noncompetition, they might elect to contract for personal obligations that bind persons not to take certain actions on their own property.<sup>68</sup> Generally defined, a personal obligation is a legal relationship whereby a person, called the obligor, is bound to render a performance in favor of another person, called the obligee.<sup>69</sup> This performance may consist of giving,

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65. See *id.* art. 639 cmt. c. This quality makes the limited personal servitude similar to the affirmative predial servitudes, where the owner of the servient estate must permit others to make use of the property. This parallel makes sense when considering the limited personal servitude's other name, the right of use. But see *id.* art. 640 cmt. b (asserting that the right of view, which necessarily obliges the servient estate owner not to build something on his estate, can be granted in the form of a personal servitude). Article 640 itself stipulates that "the right of use may confer only an advantage that may be established by a predial servitude." Comment b infers from this language that every advantage which can be established by predial servitude can also be conferred by a right of use, but this inference is unfounded. A rule stating that all of category A must also be in category B does not imply a rule that all of category B must also be in category A; it is entirely possible that one category is broader than another.

66. See YIANNPOULOS, *supra* note 20, § 6:5 (citing *Leonard v. Lavigne*, 162 So. 2d 341, 343 (La. 1964), which held that an agreement by a landowner that he and his heirs and assigns would not operate a business in competition with a lessee's created a mere personal obligation rather than a real obligation); *Mardis v. Brantley*, 717 So. 2d 702, 704 (La. Ct. App. 1998), *writ denied*, 729 So. 2d 563 (La. 1998) (stating that an agreement not to build upon land or use it for a particular purpose creates either a predial servitude or a personal obligation depending on whether it benefits an estate or a person).

67. See LA. CIV. CODE art. 1764 (referencing personal obligations as an alternative to real obligations in the law).

68. See, e.g., *Leonard v. Lavigne*, 162 So. 2d 341, 343 (La. 1964) (determining that an agreement that lessors neither operate a business in competition with their lessee nor lease other land to people who would compete with the lessee created a personal obligation).

69. LA. CIV. CODE art. 1756.

doing, or not doing something.<sup>70</sup> Personal obligations arise from a variety of sources, including lawful contracts between persons.<sup>71</sup>

In Louisiana, parties can contract for any lawful object that does not contravene legislation or public policy.<sup>72</sup> Noncompetition agreements and their associated obligations are lawful objects for contracts, but these contracts are heavily restricted by legislation.<sup>73</sup> However, this legislation only limits noncompetition agreements affecting employees, franchise owners, partners in business, and purchasers of a business's goodwill.<sup>74</sup> The legislation is geared toward regulating employment and does not regulate contracts between parties on equal footing, such as competing businesses.<sup>75</sup> Indeed, Louisiana jurisprudence indicates that neither public policy nor legislation bars contracts between landowners that create mere personal obligations not to use land in competition with another party.<sup>76</sup>

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70. *Id.*

71. *Id.* art. 1757.

72. *Id.* art. 1971.

73. *See* LA. REV. STAT. § 23:921 (2017).

74. *Id.*

75. The Louisiana Supreme Court has determined that the statute does not apply to agreements between businesses on equal footing. *Louisiana Smoked Prods., Inc. v. Savoie's Sausage & Food Prods., Inc.*, 696 So. 2d 1373, 1378–81 (La. 1997). The Court based its holding on the fact that the statute is placed next to laws governing employment, on indications that the legislature was concerned with employee abuse when it wrote the statutory language, and on the fact that the statute offers exceptions allowing noncompetition arrangements for employees when restrictions are met but not for other parties that would need less protection than employees. *Id.* The Louisiana Fifth Circuit reaffirmed the Louisiana Supreme Court's interpretation and declined to apply the statute to prohibit a predial servitude of noncompetition between two businesses acting as parties in the sale of land. *Meadowcrest Ctr. v. Tenet Health Sys. Hosps., Inc.*, 902 So. 2d 512, 515 (La. Ct. App. 2005). This interpretation appears to be the usual one by the courts even though real rights of noncompetition carry risks beyond personal obligations owing to their longevity. *See, e.g., R & K Bluebonnet, Inc. v. Patout's of Baton Rouge, Inc.*, 521 So. 2d 634, 635 (La. Ct. App. 1988); *Richard v. Broussard*, 378 So. 2d 959, 968 (La. Ct. App. 1979). In both of these cases, the court found predial servitudes of noncompetition and did not discuss statutory prohibitions against noncompetition agreements. *Id.*

76. *See, e.g., SPE FO Holdings, LLC v. Retif Oil & Fuel, LLC*, No. 07-3779, 2008 WL 754716 (E.D. La. Mar. 19, 2008) (making no mention of this statute when declaring such an arrangement a personal obligation). Neither has public policy been a bar to such arrangements before legislation. *See, e.g., Leonard v. Lavigne*, 162 So. 2d 341, 343 (La. 1964) (allowing a personal right of noncompetition to exist between a lessor and lessee).

A personal obligation not to use land to compete in a business or trade provides the beneficiary, the obligee, with fewer benefits than would a real obligation of noncompetition. When a business must rely on an obligor's lessees or successors to explicitly assume an obligation of noncompetition, there is little long-term security in the arrangement. Because real rights run with the land and are automatically enforceable against subsequent purchasers or lessees,<sup>77</sup> they are a more desirable option for businesses that wish to restrain the use of another party's land.<sup>78</sup> Parties cannot create personal servitudes that bind a landowner not to use his property in a particular manner, so businesses that seek real rights of noncompetition must contract for predial servitudes.<sup>79</sup> The jurisprudence illustrates the popularity of such predial servitudes of noncompetition among Louisiana businesses.<sup>80</sup>

## II. THE CURRENT LOUISIANA APPROACH TO REAL RIGHTS OF NONCOMPETITION

Because Louisiana real rights pass to new parties without requiring an explicit assumption of rights,<sup>81</sup> businesses occasionally contract for real rights of noncompetition.<sup>82</sup> The noncompetition agreements are sometimes included in lease contracts,<sup>83</sup> in acts of sale of land,<sup>84</sup> or in the sale of a business in

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77. LA. CIV. CODE art. 1764.

78. See, e.g., *R & K Bluebonnet*, 521 So. 2d at 635 (parties agreed that purchased property would not be used as a seafood restaurant); *SPE FO Holdings*, 2008 WL 754716, at \*1 (parties agreed as part of a sale of assets that a plot of land owned by the seller would not be used to compete with the purchaser in the sale of fuel).

79. See *supra* Part I.A–B.

80. See, e.g., *R & K Bluebonnet*, 521 So. 2d at 635 (parties agreed that purchased property would not be used as a seafood restaurant); *SPE FO Holdings*, 2008 WL 754716, at \*1 (parties agreed as part of a sale of assets that a plot of land owned by the seller would not be used to compete with the purchaser in the sale of fuel).

81. See *supra* Part I.

82. See, e.g., *R & K Bluebonnet*, 521 So. 2d at 635 (parties agreed that purchased property would not be used as a seafood restaurant); *SPE FO Holdings*, 2008 WL 754716, at \*1 (parties agreed as part of a sale of assets that a plot of land owned by the seller would not be used to compete with the purchaser in the sale of fuel).

83. E.g., *Winn-Dixie Stores, Inc. v. Dolgencorp, LLC*, 746 F.3d 1008 (11th Cir. 2014) (lawsuit to enforce lease agreements prohibiting competition across several states).

84. E.g., *R & K Bluebonnet*, 521 So. 2d at 635 (parties agreed that purchased property would not be used as a seafood restaurant).

which one party seeks assurance that the lands of the other will not be used against them.<sup>85</sup> Louisiana jurisprudence has been fairly supportive of these agreements,<sup>86</sup> except when they are embedded in lease contracts.<sup>87</sup>

*A. The Unenforceability of Real Rights of Noncompetition Embedded in Lease Agreements*

Across the various states, parties contract for lease agreements that limit the lessor's use of his remaining property so that it cannot be used, leased, or sold in a way that would compete with the lessee's business interests.<sup>88</sup> In most common law states, this lease stipulation creates a right that can be enforced not only against the lessor but also against third parties, such as fellow lessees, who have an interest in the property as long as these parties were aware of the lease restriction before acquiring their interest in the property.<sup>89</sup>

However, Louisiana courts have long classified leases as contracts establishing only personal rights and obligations.<sup>90</sup> As part of the lease arrangement, an embedded noncompetition agreement that limits the use of the lessor's land is also considered a personal obligation<sup>91</sup> even when the parties express their intent that the obligation should automatically bind the "heirs and assigns" of the lessor.<sup>92</sup> This classification as a personal obligation means that these noncompetition agreements, always enforceable against the

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85. See, e.g., *SPE FO Holdings*, 2008 WL 754716, at \*1 (parties agreed as part of a sale of assets that a plot of land owned by the seller would not be used to compete with the purchaser in the sale of fuel).

86. E.g., *R & K Bluebonnet*, 521 So. 2d at 635; *Meadowcrest Ctr. v. Tenet Health Sys. Hosps., Inc.*, 902 So. 2d 512, 514 (La. Ct. App. 2005).

87. *Leonard v. Lavigne*, 162 So. 2d 341, 342–43 (La. 1964); *Winn-Dixie*, 746 F.3d at 1031.

88. See, e.g., *Leonard*, 162 So. 2d at 343; *Winn-Dixie*, 746 F.3d at 1015 (establishing that Winn Dixie has made such leasing agreements for most of its approximately 500 stores across various states).

89. *Leonard*, 162 So. 2d at 342 (illustrating that Florida courts adopt this approach); *Winn-Dixie*, 746 F.3d at 1033 (explaining that the Florida approach is the common law norm).

90. *Richard v. Hall*, 874 So. 2d 131, 145 (La. 2004) (citing A. N. YIANNPOULOS, PROPERTY § 226, in 2 LOUISIANA CIVIL LAW TREATISE (4th ed. 2001)).

91. *Leonard*, 162 So. 2d at 342–43; *Winn-Dixie*, 746 F.3d at 1031.

92. *Leonard*, 162 So. 2d at 342–43. The mention of "heirs and assigns" demonstrates the parties' intent to create a real right, one that would bind future third parties to the contract without requiring the third parties' explicit assumption of the lessor's obligations. The Court deemed this arrangement invalid. *Id.* at 343.

landowner who signed the contract, are not ordinarily enforceable against third parties, such as future owners of the property or fellow lessees.<sup>93</sup> Third parties will be bound only if they expressly assume, in writing, the obligations of the original obligor, the owner of the land.<sup>94</sup>

*B. The Predial Servitude: Validated Real Rights of Noncompetition*

The Louisiana Supreme Court has not yet addressed whether a predial servitude of noncompetition is enforceable. Indeed, the only time that the Court has addressed real rights of noncompetition was when it held that lease agreements with embedded noncompetition clauses could not create real rights because lease contracts place burdens on the lessors, and not their estates.<sup>95</sup> Louisiana lower courts, on the other hand, have regularly enforced predial servitudes of noncompetition that accompany the sale of land or the sale of a business.<sup>96</sup> Despite the apparent pattern, there is no evidence to suggest that the courts consider the sale of land or business to

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93. *E.g.*, *Leonard*, 162 So. 2d at 343; *Winn-Dixie*, 746 F.3d at 1031. Louisiana is not the only state that does not allow land restrictions in lease agreements to be enforced against third parties. Mississippi, at least, requires privity of estate between parties for enforcement of contractual obligations. *Id.* at 1031. Such privity is found between a lessor and his lessee but is not found between lessees that share a lessor. *Id.* at 1032. In this sense, Mississippi law would achieve the same result as Louisiana law: the lessee who wishes to enforce his right can pursue the lessor but not third parties such as fellow lessees. This similarity shows that although Louisiana law is uniquely civilian in its classification of rights, the treatment of these restrictive covenants is not wholly foreign to businesses operating among the various states.

94. *See* SPE FO Holdings, LLC v. Retif Oil & Fuel, LLC, No. 07-3779, 2008 WL 754716, at \*5 (E.D. La. Mar. 19, 2008) (the existence of an enforceable obligation depended on whether a personal obligation survived a mortgage foreclosure and was assumed by purchasers of property); *id.* at \*3 (reaffirming the earlier court determination and finding that assumption of obligations must be expressly made in writing). The Civil Code provides the legislative rules regarding assumption of obligations in Louisiana. LA. CIV. CODE arts. 1821–24 (2017).

95. *Leonard*, 162 So. 2d at 343. The Court interpreted a lease agreement that purportedly established a real right prohibiting a lessor's land from being used in competition with one of his lessee's business. *Id.* The Court found that a lease arrangement places burdens only on persons and not on their estates; accordingly, the Court held that the lease agreement could not create a real right. *Id.*

96. *E.g.*, *R & K Bluebonnet, Inc. v. Patout's of Baton Rouge, Inc.*, 521 So. 2d 634, 635 (La. Ct. App. 1988); *Meadowcrest Ctr. v. Tenet Health Sys. Hosps., Inc.* 902 So. 2d 512, 514 (La. Ct. App. 2005).

be a prerequisite for the existence of these servitudes; rather, it is by mere coincidence that the cases have involved such sales.<sup>97</sup>

*1. Lower Court Endorsement of Real Rights of Noncompetition*

In *R & K Bluebonnet, Inc. v. Patout's of Baton Rouge, Inc.*, the Louisiana Second Circuit Court of Appeal held that an act of sale stipulating that the property sold would not be used for the operation of a seafood restaurant in competition with the seller's business had created a predial servitude.<sup>98</sup> The seller, owner of a ten-acre tract of land, sold part of his tract and retained the remainder to operate a seafood restaurant.<sup>99</sup> The act of sale included a provision prohibiting the purchased property from hosting a seafood restaurant for 60 months after the sale.<sup>100</sup> The parties explicitly agreed that the obligation would serve as a "building restriction" on the land.<sup>101</sup> The court determined that the agreement was not a "building restriction," but an enforceable predial servitude.<sup>102</sup> The court noted that the act of sale created two estates and that the arrangement was "meant" to burden the restricted property for the benefit of the seller's remaining property, the dominant estate.<sup>103</sup> Satisfied with this solution, the court did not examine whether noncompetition benefitted the dominant estate; it was merely assumed.

In *Richard v. Broussard*, the Louisiana Third Circuit determined that an arrangement in an act of sale that restricted the use of the property to only residential purposes had created a predial servitude despite the

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97. See LA. CIV. CODE art. 654 (establishing that conventional predial servitudes can be created by juridical act without requiring that act to be a contract of sale). One explanation for the jurisprudential pattern is that the business contracts creating predial servitudes of noncompetition are more likely to be drafted alongside the sale of land or business assets and so more likely to be adjudicated under these circumstances.

98. *R & K Bluebonnet*, 521 So. 2d 634, 635 (La. Ct. App. 1988).

99. *Id.* at 635.

100. *Id.*

101. *Id.* The term "building restriction" refers to a particular form of real right in which a party might break up an estate and place upon it rules of use according to a development plan. LA. CIV. CODE arts. 775–783. Building restrictions do not exist in the absence of a general plan of development that affects several estates together. *R & K Bluebonnet*, 521 So. 2d at 635.

102. *R & K Bluebonnet*, 521 So. 2d at 635.

103. *Id.* The court made no distinction between the seller's business and his estate as the thing benefitting from noncompetition.

parties' beliefs that the arrangement was a building restriction.<sup>104</sup> The court found that the seller had sold only part of his estate, thus creating two separately owned estates, and that the restriction placed on the encumbered servient estate benefitted the seller's dominant estate.<sup>105</sup> The court did not explain *how* the restrictions on the servient estate benefited the dominant estate; the court merely assumed this element.

In *Meadowcrest Center, v. Tenet Health System Hospitals, Inc.*, the Louisiana Fifth Circuit found a predial servitude of noncompetition when parties to a sale of land agreed that the buyer's land would not be used to operate a medical facility in competition with the seller's own.<sup>106</sup> The seller—a hospital looking to unload extra property—and the buyer agreed that the sold property would not be used for “an outpatient surgical center or a diagnostic center or any similar facility” unless the buyer obtained permission from the seller or its successors or assigns.<sup>107</sup> The court found that the arrangement burdened the servient estate by obligating the owner to refrain from taking action on his own property, and the court called this restriction “precisely the kind of restriction contemplated” in Louisiana Civil Code article 706.<sup>108</sup> In accordance with the jurisprudential trend, the court did not discuss how the restriction benefitted the dominant estate.

In *Textron Fin. Corp. v. Retif Oil & Fuel LLC*, the U.S. Fifth Circuit Court of Appeals determined that a predial servitude was not created when the parties to a sale of business assets agreed that the seller's estate would not be used to compete with the buyer's operations in the same parish.<sup>109</sup> The parties had agreed that only the buyer and his corporate successors would have the right to enforce the noncompetition agreement, and the agreement was to run as long as the buyer operated his business anywhere in the parish.<sup>110</sup> Because the agreement would benefit the buyer, even if he

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104. 378 So. 2d 959, 968 (La. Ct. App. 1979). The opinion in this case gives no indication that the residential requirement was meant to prohibit competition with the seller; instead the seller sought to restrict the property to residential use for some purpose of his own. *Id.* Still, the instance is close enough to noncompetition insofar as one servient estate is prohibited from participating in trade while the dominant estate could be put to trade without fear of competition from the servient estate.

105. *Id.*

106. 902 So. 2d 512, 514 (La. Ct. App. 2005).

107. *Id.*

108. *Id.*

109. 342 F. App'x 29, 33 (5th Cir. 2009).

110. *Id.* at 34. According to this arrangement, the buyer could move his business onto another estate within the parish and still enforce the noncompetition agreement even if he had disposed of the estate on which his business originally stood. *Id.*



relocated his business to another property, the court held that the agreement did not identify a dominant estate and thus was a personal obligation rather than a predial servitude.<sup>111</sup> The court did not object, however, to the theoretical existence of a predial servitude of noncompetition should a dominant estate be named.

The overwhelming trend in the jurisprudence is that Louisiana courts uphold and enforce predial servitudes of noncompetition without much scrutiny. The courts tend to focus their analysis on whether the contracts in question adequately identify a servient and dominant estate, and almost no analysis is dedicated to the other elements of a predial servitude. Of particular concern, Louisiana jurisprudence has not explored whether prohibitions on trade can truly benefit a dominate estate; instead the courts operate as if this necessary element is always satisfied. This trend against heavy scrutiny of purported servitudes has seen Louisiana courts vastly oversimplify important questions of law and fact.<sup>112</sup>

## 2. *The One Court in Opposition*

At least one exception to this strong line of jurisprudence exists, albeit in the form of dicta from a federal district court. In *SPE FO Holdings, LLC v. Retif Oil & Fuel, LLC*, the U.S. District Court for the Eastern District of Louisiana determined that a valid predial servitude was not created when parties to a sale of business assets agreed that the seller would not use his estate to compete with the buyer's business of selling gas.<sup>113</sup> The arrangement was to last as long as the buyer operated his business in the parish, whether on the purchased property or elsewhere.<sup>114</sup> Accordingly, the court held that while the "Building and Ownership Restrictions" arrangement between the parties specified a servient estate in the form of the seller's property, it did not specify a dominant estate and so could not form a predial servitude.<sup>115</sup> The court went further, however, by outright rejecting the viability of predial servitudes of noncompetition: "While reasonable restraints on competition may establish personal obligations between the contracting parties, prohibitions against competition may not constitute real rights in Louisiana."<sup>116</sup>

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111. *Id.*

112. *See infra* Part III.B.

113. *SPE FO Holdings, LLC v. Retif Oil & Fuel, LLC*, No. 07-3779, 2008 WL 754716, at \*1 (E.D. La. Mar. 19, 2008).

114. *Id.* at \*3.

115. *Id.*

116. *Id.* at \*4.

The jurisprudential authority that the court relied on does not actually support the court's assertions,<sup>117</sup> but the court's bias against predial servitudes of noncompetition has at least some doctrinal support.<sup>118</sup> Based on Louisiana's public policy against land encumbrances and noncompetition agreements, the *SPE* court was right to be critical of predial servitudes of noncompetition.<sup>119</sup> Based on the requirements for a valid predial servitude, however, the court was wrong to declare that predial servitudes of noncompetition can never exist under Louisiana law; the correct analysis sits between the federal court's blanket rejection and the Louisiana courts' blanket support for these servitudes.<sup>120</sup>

### III. LOUISIANA'S JURISPRUDENCE CHALLENGES PUBLIC POLICY AND LEGISLATION

Predial servitudes of noncompetition face two major obstacles to legitimacy. First, the underlying noncompetition agreements only sometimes create a benefit for the dominant estate; this inconsistency is especially problematic in light of Louisiana's public policy for strict interpretation and harsh scrutiny of predial servitudes. Second, predial servitudes of noncompetition clash with Louisiana's strong public policy against noncompetition agreements. These issues cast doubt upon a line of jurisprudence that has casually validated predial servitudes of noncompetition without heavy scrutiny.

#### *A. Louisiana's Public Policy Against Predial Servitudes and Noncompete Agreements*

Louisiana courts have found that predial servitudes are derogations against public policy by their very nature.<sup>121</sup> Meanwhile, Louisiana legislation makes clear that land encumbrances<sup>122</sup> and noncompetition

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117. The court cited to *Leonard v. Lavigne*, 162 So. 2d 341 (La. 1964) and *Soho Serve Corp. v. Westowne Ass'n*, 929 F.2d 160 (5th Cir. 1991). *SPE FO Holdings, LLC v. Retif Oil & Fuel, LLC*, No. 07-3779, 2008 WL 754716, at \*4 (E.D. La. Mar. 19, 2008). Unfortunately, the cases cited do not address whether noncompetition rights can ever form real rights in Louisiana; instead, the cases deal with issues of lease agreements and whether leases in Louisiana create real or personal obligations.

118. See A. N. YIANNPOULOS, PROPERTY § 227, in 2 LOUISIANA CIVIL LAW TREATISE (4th ed. 2001); YIANNPOULOS, *supra* note 20, § 6:5.

119. See *infra* Part III.

120. See *infra* Part III.B.3.

121. *Palomeque v. Prudhomme*, 664 So. 2d 88, 93 (La. 1995).

122. See *infra* Part III.A.2.

agreements<sup>123</sup> are disfavored under the law. Predial servitudes of noncompetition encumber the land and restrict trade. Therefore, courts should use extreme caution as they apply the law and decide whether or not to enforce these arrangements. Clearly, Louisiana courts have been too rash in their treatment of real rights of noncompetition;<sup>124</sup> and a closer inspection of such arrangements is required.

### *1. Jurisprudential Presumptions Against Predial Servitudes*

Louisiana public policy favors the free use of land, and the courts evaluate supposed servitudes under heavy scrutiny lest land be encumbered—perhaps permanently.<sup>125</sup> The Louisiana Supreme Court declared that predial servitudes are in “derogation of public policy” and “not entitled to be viewed with favor by the law” because they form restraints on the free disposal and use of property.<sup>126</sup> The Court interprets any contract for the creation of servitudes in favor of unencumbered ownership and the free and exclusive enjoyment of property rights;<sup>127</sup> any doubt regarding the existence or extent of a predial servitude is resolved in favor of the servient estate.<sup>128</sup> Lower courts have consistently found that this public policy requires strict interpretation that presumes the nonexistence of the servitude.<sup>129</sup> Consequently, the elements of a predial servitude should be examined with a critical eye.

### *2. Legislative Presumptions Against Encumbrances of Land*

Beyond the jurisprudentially stated public policies, the Louisiana Civil Code explicitly favors the free use of land and disfavors real obligations that restrain it. For example, predial servitudes that are not readily apparent to third parties can only be created by written title,<sup>130</sup> and the title must be

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123. *E.g.*, LA. REV. STAT. § 23:921 (2017).

124. *See surpa* Part II.B.1.

125. *Palomeque*, 664 So. 2d at 93.

126. *Id.*

127. *Parish v. Municipality No. 2*, 8 La. Ann. 145, 152 (1853); *Leonard v. Lavigne*, 162 So. 2d 341, 343 (La. 1964).

128. *Palomeque*, 664 So. 2d at 93.

129. *Textron Fin. Corp. v. Retif Oil & Fuel LLC*, 342 F. App'x 29, 33 (5th Cir. 2009); *Griffith v. Cathey*, 762 So. 2d 29, 34 (La. Ct. App. 2000), *writ denied*, 771 So. 2d 85 (La. 2000); *SPE FO Holdings, LLC v. Retif Oil & Fuel, LLC*, No. 07-3779, 2008 WL 754716, at \*2 (E.D. La. Mar. 19, 2008).

130. LA. CIV. CODE art. 739 (2017). For example, noncompetition predial servitudes would qualify as non-apparent servitudes because they do not produce

recorded to affect third parties to the contract.<sup>131</sup> By imposing such onerous conditions for the creation and enforcement of servitudes, the legislature makes clear that land should be unburdened unless parties fulfill the particular requirements to make it otherwise.

Further direct bias against predial servitudes is found in Louisiana Civil Code articles 730 through 734.<sup>132</sup> Indeed, article 730 makes clear that courts should start by presuming that servitudes do not exist: “Doubt as to the existence, extent, or manner of exercise of a predial servitude shall be resolved in favor of the servient estate.”<sup>133</sup> However, this harsh legislative scrutiny does not mean that parties must express certain magic words in their contracts to create predial servitudes.<sup>134</sup> Louisiana Civil Code article 731 notes: “A charge established on an estate expressly for the benefit of another estate is a predial servitude although it is not so designated.”<sup>135</sup>

Emphasizing caution<sup>136</sup> and scrutiny rather than deference to the labels used by the parties,<sup>137</sup> the legislation and public policy behind predial servitudes require that the courts avoid enforcing predial servitudes unless the law and facts unambiguously support their existence. This legislative truth applies with even more force to predial servitudes of noncompetition because of the strong public policy against restrictions of trade.<sup>138</sup>

### 3. *The Public Policy Against Noncompetition Agreements*

Noncompetition agreements are heavily regulated by legislation in various states.<sup>139</sup> For many states, the default position is that such arrangements are not enforceable unless they fall into certain narrowly defined exceptions.<sup>140</sup> Louisiana falls into this category of states and bars

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apparent physical effects on the estate that would indicate the servitude's existence to outsiders.

131. The establishment of predial servitudes is subject to the laws on alienation of immovables. *Id.* art. 708. Sales of immovables occur either by an act under private signature or an authentic act. *Id.* art. 2440. Transfers of immovables must be filed in the parish registry to affect third parties. *Id.* art. 517.

132. *See id.* arts. 730–734.

133. *Id.* art. 730.

134. *Id.* art. 731.

135. *Id.*

136. *Id.* art. 730.

137. *Id.* art. 731.

138. *See supra* Part III.A.3.

139. *See, e.g.,* LA. REV. STAT. § 23:921 (2017); MONT. CODE ANN. § 28-2-703 (2017); TEX. BUS. & COM. CODE ANN. § 15.50 (West 2015).

140. For example, California, Montana, North Dakota, and Oklahoma bar the use of noncompetition agreements except as between partners in a dissolved

noncompetition agreements except in narrow circumstances.<sup>141</sup> The statute governing noncompetition agreements states:

*Every contract or agreement, or provision thereof, by which anyone is restrained from exercising a lawful profession, trade, or business of any kind, except as provided in this Section, shall be null and void. However, every contract or agreement, or provision thereof, which meets the exceptions as provided in this Section, shall be enforceable.*<sup>142</sup>

The exceptions contained in the statute involve contracts for employment relationships, the sale of a business's goodwill, business partnerships, and franchise.<sup>143</sup> In each case, save the franchise exception, the agreements are limited to a term of two years and to particular parishes specified in the contracts.<sup>144</sup> These contracts also terminate once the obligee ceases to engage in the protected business or industry.<sup>145</sup> Louisiana law does not permit contracts that eternally bar a person from practicing a trade or from practicing anywhere in the world.

Louisiana's general legislative prohibition of noncompetition agreements does not directly bar real rights of noncompetition.<sup>146</sup> Nevertheless, the statute demonstrates that Louisiana greatly disfavors noncompetition arrangements, much as it disfavors land restrictions, and these agreements are tested under heavy scrutiny.<sup>147</sup>

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partnership or between the seller and purchaser of a company and its goodwill. *See* CAL. BUS. & PROF. CODE § 16600 (West 2017); MONT. CODE ANN. § 28-2-703; N.D. CENT. CODE ANN. § 9-08-06 (West 2017); OKLA. STAT. tit. 15, § 217 (2017). *C.f.*, TEX. BUS. & COM. CODE ANN. § 15.50 (allowing such agreements when they are part of an otherwise enforceable agreement and "to the extent that it contains limitations as to time, geographical area, and scope of activity to be restrained that are reasonable and do not impose a greater restraint than is necessary to protect the goodwill or other business interest of the promise").

141. LA. REV. STAT. § 23:921. Establishing a contract of noncompetition is possible only if the parties have engaged in the sale of a business's goodwill, they were partners in business, there was a franchise relationship, or there was an employment or contractor relationship between the parties. *Id.* These agreements cannot last more than two years and are limited in their geographic scope. *Id.*

142. *Id.* (emphasis added).

143. *Id.*

144. *Id.*

145. *Id.*

146. *See* discussion *supra* note 75.

147. *See* *Desselle v. Petrossi*, 207 So. 2d 190, 192 (La. Ct. App. 1968) (upholding a restriction on competition after a sale of a business and its goodwill).

Because of Louisiana's strong public policy against encumbrances on land, against the existence of predial servitudes, and against noncompetition agreements, courts should be cautious in enforcing an agreement that contains elements of both predial servitudes and noncompetition agreements. In this respect, the courts have failed because they almost always assume that predial servitudes of noncompetition are valid under Louisiana law without giving adequate analysis to whether the necessary elements of a predial servitude are satisfied.<sup>148</sup>

### *B. Difficulty Meeting the Elements of Predial Servitude*

Predial servitudes must satisfy three criteria: (1) two separately owned estates; (2) one servient and burdened; (3) for the benefit of the dominant.<sup>149</sup> Of the three essential criteria for predial servitudes, the one least addressed by courts is the benefit to the dominant estate.<sup>150</sup> It is not difficult for parties to identify two separately owned estates or to place a burden of noncompetition on one of them, but a close analysis reveals that it is not so easy to demonstrate a benefit to the dominant estate.<sup>151</sup>

Indeed, a predial servitude of noncompetition will only benefit a dominant estate when the dominant estate has been so altered or improved that future owners will, more likely than not, use the land for the same purpose as the owner who contracted for the predial servitude.<sup>152</sup>

#### *1. The Benefit to the Dominant Estate Defined*

Article 647 makes clear that to create a predial servitude, "there must be a benefit to the dominant estate. . . . There is no predial servitude if the charge imposed cannot be reasonably expected to benefit the dominant estate."<sup>153</sup> This simple language belies a complex requirement.

The greatest difficulty for the creation of any predial servitude is ensuring that the burden on the servient estate benefits a dominant estate

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148. See *supra* Part II.B.1; *c.f.* SPE FO Holdings, LLC v. Retif Oil & Fuel, LLC, No. 07-3779, 2008 WL 754716, at \*1 (E.D. La. Mar. 19, 2008) (holding that a predial servitude of noncompetition could not be enforced because there was no benefit to a dominant estate).

149. See *supra* Part I.A.

150. See *supra* Part II.

151. See *infra* Part III.B.1–3.

152. See *infra* Part III.B.

153. LA. CIV. CODE art. 647 (2017).

and not merely a person.<sup>154</sup> This problem arises when the parties have created an obligation that could benefit either a person or an estate without identifying either as the beneficiary or when parties have created an obligation that cannot benefit a dominant estate at all. In the former case, in which parties are merely vague in their intentions, the Louisiana Civil Code instructs courts to apply specific rules of contract interpretation.<sup>155</sup> In the latter case, where parties have contracted for a right that cannot benefit a dominant estate, the contract cannot be enforced as a predial servitude.<sup>156</sup>

The line between rights that can benefit a dominant estate and those that cannot is unclear. The Civil Code does not define what constitutes a benefit to a dominant estate under article 647. Adding to the confusion, there are rights that give personal advantages and conveniences which are deemed to benefit an estate rather than a person.<sup>157</sup> Indeed, any benefit

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154. See, e.g., *Textron Fin. Corp. v. Retif Oil & Fuel LLC*, 342 F. App'x 29, 33 (5th Cir. 2009) (holding that the parties designated a burden in benefit of a person rather than a separate estate by the wording of their contract).

155. When the parties do not make their intentions clear, articles 732 through 734 impose presumptions on the existence of predial servitudes according to the nature of the right created, whether it is of a nature "to confer an advantage on an estate," or "for the convenience of a person." LA. CIV. CODE arts. 733–734. In the former case, under article 733, courts will presume the existence of a predial servitude even when the parties have not explicitly stated that the right exists for the benefit of an estate. *Id.* art. 733. In the latter case, under article 734, courts will not presume that an arrangement is a predial servitude unless the parties confirm that their arrangement is for the benefit of one person "as owner of an estate" and for that owner's heirs and assigns. *Id.* art. 734. For examples of these articles in action, see *Burgas v. Stoutz*, 141 So. 67, 69 (La. 1932) (holding that an arrangement where the "purchaser has the privilege of using the paved driveway . . . which driveway is part of Lot B" created a predial servitude because use of the neighbor's driveway would necessarily benefit an estate and raise its property values by freeing land to use for other purposes); *Gillis v. Nelson*, 16 La. Ann. 275, 279 (La. 1861) (holding that an arrangement where one party was obliged to leave a levee on their property had created a predial servitude because it benefitted the dominant estate by blocking flood waters).

156. LA. CIV. CODE art. 647.

157. *Id.* art. 734 (establishing that some arrangements that convey a mere convenience to a person might be predial servitudes when the parties express that intention). One can argue that reading articles 647 and 734 together creates an apparent contradiction in the law. The language in article 734 suggests that when a right is granted merely for the convenience of a person it is considered to be a predial servitude as long as it is acquired by a person as owner of an estate for himself and his heirs and assigns. LA. CIV. CODE art. 734. Read *in pari materia* with article 647, a self-conflicting rule is created: predial servitudes, which by

contained in a predial servitude is necessarily enjoyed by a person, the owner of a dominant estate, rather than the property; the attribution of the benefit to the estate is a mere fiction.<sup>158</sup> Nevertheless, there must be a distinction between benefits that benefit an estate and those that do not; otherwise, the language of article 647 is superfluous,<sup>159</sup> and predial

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their nature require a right that can reasonably be interpreted to benefit a dominant estate, will be presumed to exist when the right conveys a mere personal convenience as long as a person acquired it as owner of an estate for himself and for his heirs and assigns. The tension arises when trying to reconcile the need for rights that benefit an estate with the apparent validity of rights that merely convenience a person. Article 734, however, must be read in light of article 640, which establishes that only those rights conveyable through a predial servitude may be conveyed in a personal servitude; such a reading makes clear that article 734 is simply a poorly phrased interpretation rule that helps courts classify rights that could equally benefit either a person or a dominant estate. Because the rights for personal servitudes could just as easily form predial servitudes, courts need a way to distinguish the intention of the parties when the contract is not explicitly labeled. Article 734 allows the court to question whether the parties intended their agreement to benefit an estate owner as a person or as the first in a long line of estate owners. YIANNOPOULOS, *supra* note 20, § 1:9 (citing G. BALIS, CIVIL LAW PROPERTY 299 (3d ed. 1955) (in Greek)). “For example, a servitude in favor of a named owner of an estate for the enjoyment of a swimming pool or of a tennis court in another estate is a limited personal servitude.” *Id.* The Code of 1870 made this correct interpretation more apparent through examples:

Thus for example, if the owner of a house near a garden or park, should stipulate for the right of walking and gathering fruits and flowers therein, this right would be considered personal to the individual, and not a servitude in favor of the house or its owner. . . . But the right becomes real and is a predial servitude, if the person stipulating for the servitude, acquires it as owner of the house, and for himself, his heirs and assigns.

LA. CIV. CODE art. 757 (1870). The comments to article 734 indicate that the article was meant to replicate the substance of article 757. LA. CIV. CODE art. 734, cmt. a (2017). The main intended change in the legislation was to acknowledge that some arrangements in favor of a person might be personal servitudes, and not merely personal obligations, when there is no indication that they should be classified as predial servitudes. *Id.* art. 734, cmt. b. Though the language of the articles creates some initial confusion, there is no conflict between articles 647 and 734, and there should be no doubt that a predial servitude truly does require a benefit to a dominant estate. It is not enough that a right might convenience a person who claims it as owner of an estate if the right in question cannot benefit a dominant estate, for such an arrangement will never create a predial servitude.

158. LA. CIV. CODE art. 646 cmt. c.

159. Article 646 already establishes that a predial servitude is a charge on a servient estate for the benefit of a dominant estate. *Id.* art. 646. If any charge on a servient estate might be written by the parties to favor a dominant estate, then



servitudes might be established on the mere declaration of the parties involved.<sup>160</sup>

Doctrine and jurisprudence make clear that article 647 is not wasted language. Professor Yiannopoulos has called article 647's requirement the "principle of utility" because it describes a key feature of predial servitudes.<sup>161</sup> The Louisiana Civil Code once contained language that made the principle of utility more explicit,<sup>162</sup> and the Louisiana Supreme Court has enforced this element of predial servitudes since 1853 by invalidating predial servitudes that benefit only a person instead of an estate.<sup>163</sup> Similarly, the Second Circuit has recognized the principle of

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there would be no need for the following language in article 647: "there is no predial servitude if the charge imposed cannot be reasonably expected to benefit the dominant estate." *Id.* art 647. Article 647 would stand as mere superfluous repetition of article 646. This problematic reading is avoided, however, if some charges on a servient estate cannot benefit a dominant estate no matter the intent of the parties; for, if charges on servient estates can be divided into two groups—those that can benefit a dominant estate and those that cannot—then article 647 establishes that predial servitudes can only be formed from the former group no matter how intensely the parties insist that a charge in the latter group benefits a dominant estate.

160. The Louisiana Supreme Court has already noted that parties cannot create real rights merely by intention when the rights are not of the proper sort. *Leonard v. Lavigne*, 162 So. 2d 341, 342 (La. 1964) (stating that parties' intention that a lease agreement run with the property against third parties is not enough to transform a lease into a real right).

161. YIANNOPOULOS, *supra* note 20, § 1:9.

162. In 1949, at least, article 709 of the Civil Code provided in part:

Owners have a right to establish on their estates, or in favor of their estates, such servitudes as they deem proper; provided, nevertheless, that the services be not imposed on the person or in favor of the person, but only on an estate or in favor of an estate; and provided, moreover, that such services, imply nothing contrary to public order.

LA. CIV. CODE art. 709 (1949); *Holloway v. Ransome*, 43 So. 2d 673, 675 (La. 1949). This older code article makes it clear that predial servitudes are limited to rights that burden and benefit estates rather than persons. The comments to article 697 make clear that "this language has not been reproduced . . . because it is apparent from the definition and the essential features of predial servitudes." LA. CIV. CODE art. 697 cmt. d (2017). Though the modern article is less explicit, the law is unchanged. *Id.*

163. *See Parish v. Municipality No. 2*, 8 La. Ann. 145, 149 (1853) (holding that a compromise agreement between parties whereby the state, as owner of property, agreed to leave open a section of land to the public and to refrain from building upon it was not a predial servitude because the benefit went toward the

utility, albeit by analogy, by extinguishing a personal servitude of passage that had ceased to benefit a railroad that had shut down its rail line on the property.<sup>164</sup> To apply the principle of utility against predial servitudes of noncompetition, courts must determine whether noncompetition benefits an estate or merely a person.<sup>165</sup>

The comments to Louisiana Civil Code article 647 offer some guidance for interpreting the principle of utility and identifying which rights can be deemed to benefit an estate. The benefit must derive from the servient estate, not be attributed to a designated person, and must be attributed to the person who owns the dominant estate “at any given time.”<sup>166</sup> For example, absent a designation of a particular person as beneficiary,<sup>167</sup> a servitude for the maintenance of a bathroom is a predial servitude because it clearly benefits all future owners of the dominant estate who have access to that bathroom.<sup>168</sup> It is immaterial that bathing is a personal habit because every future owner will benefit from this access.<sup>169</sup> The same rule applies in servitudes for access to a swimming pool or tennis court on a servient estate.<sup>170</sup>

The jurisprudential guidance defining a benefit to a dominant estate comes from the Louisiana Supreme Court itself, albeit in the form of a rather old case.<sup>171</sup> In *Parish v. Municipality No. 2*, the Louisiana Supreme Court found that although the parties had correctly named a servient and dominant estate in an attempt to create a predial servitude, they had

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private, public-minded interests of the parties rather than toward the probable interests of all future owners of the parties’ estates).

164. *Swayze v. State Dep’t of Transp. & Dev.*, 793 So. 2d 1278, 1280 (La. Ct. App 2001), *writ denied*, 808 So. 2d 342 (La. 2002). This case concerned a personal servitude acquired by a railroad, but the court applied article 647 by analogy. *Id.* This application is acceptable because article 645 establishes that personal servitudes are governed by predial servitude articles where applicable. The court found that the servitude had ceased to be useful for a railroad company that had closed off the rail line running through it; without a clear benefit to the beneficiary, the personal servitude was extinguished. *Id.*

165. LA. CIV. CODE art. 647.

166. *Id.* art. 647 cmt. c.

167. These same rights can just as easily be personal servitudes if the parties establish them for particular persons rather than for all future owners of an estate. *Id.* (citing *Greco v. Frigerio*, 3 La. App. 649, 651 (Orl. Cir. 1926)).

168. *Id.*

169. *Id.*

170. *Id.*

171. *Parish v. Municipality No. 2*, 8 La. Ann. 145 (1853).

selected a right that did not benefit the dominant estate.<sup>172</sup> The parties agreed to a donation of land to the state with the provision that the land not be built upon, alienated, or denied to the public except under certain conditions.<sup>173</sup> The donors' successor-in-title tried to enforce the agreement as a predial servitude of view and access,<sup>174</sup> but the Court determined that the actual intention behind the contract was to create a park and ensure public access for the gratification of the donors' desire to "favor the public."<sup>175</sup> Because the benefit was one that accrued to these individual donors and would not apply in all cases to future owners of the dominant estate, who might be less philanthropically inclined than their predecessors, the Court determined that there was no predial servitude and held that the obligation was personal in nature.<sup>176</sup>

In light of the comments to article 647 and the Court's decision in *Parish v. Municipality No. 2*, the benefit to the dominant estate can be defined as follows: a benefit to the dominant estate derives from the servient estate, benefits any given owner of the dominant estate at any given time, and is not reliant on the particular whims or motives of that person.<sup>177</sup> Under this definition, predial servitudes of noncompetition

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172. *Id.* at 149 (holding that a compromise agreement between parties whereby the state, as owner of property, agreed to leave open a section of land to the public and to refrain from building most buildings upon it was not a predial servitude because the benefit went toward the private, public-minded interests of the parties rather than toward the probable interests of all future owners of the parties' estates).

173. *Id.* at 146.

174. *Id.*

175. *Id.*

176. *Id.* at 149. The plaintiffs also claimed that the supposed servitude benefitted the dominant estate by raising its property value, but the Court quickly rejected this argument. *Id.* The Court was right to dismiss the argument because only those persons who owned the property during the one-time increase in value can profit from it. For all subsequent purchasers of the property, the increase in value is offset by the higher acquisition price they must pay.

177. This definition would classify access to a swimming pool as a valid predial servitude because any owner of a dominant estate, or at least any generic owner, could make beneficial use of the right. Even if one owner cannot swim or has no desire to do so, the activity is so common a form of leisure and exercise that it is reasonable to expect a randomly selected successor in ownership to be pleased with the servitude right rather than to react with indifference or disdain. The same goes for other rights: of drain because any given owner can be expected to detest flooding, of support because any given owner would appreciate a right that keeps his structure upright, and so on. On the other hand, a guarantee that the

generally do not benefit the dominant estate and only benefit a particular business.

*2. Most Noncompetition Agreements Fail to Benefit the Dominant Estate*

In violation of article 647, predial servitudes of noncompetition tend not to create rights for all future owners of an estate, but instead for the specific person who operates a business on the dominant estate at the time the servitude is created.<sup>178</sup> For example, consider an accounting firm with two office buildings on two estates. Suppose this firm sells one office building—the servient estate—on the condition that it not be used to provide accounting services in competition with the other office building—the dominant estate. A great variety of professionals might make use of office space, and it is a stretch to presume that any given owner of the dominant estate will provide accounting services and benefit from the noncompetition servitude as the seller did.<sup>179</sup> The same analysis applies to small shops and retail locations: a baker gains nothing from an arrangement that prohibits his neighbors from operating floral shops, repairing bicycles, or selling electronics.<sup>180</sup>

Most predial servitudes of noncompetition cannot be reasonably expected to benefit the owner of a dominant estate whomever it may be at any given time. In many noncompetition servitude arrangements, just as in the *Parish* public park dispute,<sup>181</sup> parties attempt to attribute their personal business whims to their property and inappropriately presume that successors will share their needs and desires.<sup>182</sup> A subsequent owner, who in theory might make a business out of a home or vice versa, is as likely to share his predecessor's profession as he would share his philanthropic disposition.<sup>183</sup> Therefore, these noncompetition agreements do not benefit the dominant estate as required under article 647.<sup>184</sup>

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public be permitted to picnic on the servient estate would not be a predial servitude because the benefit appeals to an owner's personal philanthropy.

178. YIANNPOULOS, *supra* note 20, § 6:5.

179. *See id.*

180. *See id.*

181. *See Parish*, 8 La. Ann. at 149.

182. *See YIANNPOULOS*, *supra* note 20, § 6:5.

183. *See Parish*, 8 La. Ann. at 149 (holding that because any given future owners of property could not be reasonably expected to derive philanthropic pleasure from the preservation of servient land as a public park, the obligation not to develop or build upon the land could not form a valid predial servitude).

184. *See supra* Part III.B.1.

Because these rights of noncompetition cannot reasonably be expected to benefit a dominant estate, they cannot create valid predial servitudes. Louisiana courts have been too quick to acknowledge these rights and to bar properties from legitimate commercial activities. Against Louisiana's strong public policy, property is being barred from commerce and ownership is being restricted. By failing to scrutinize these predial servitudes of noncompetition, Louisiana courts are acting against the very same public policy considerations they espouse in other cases.

Professor Yiannopoulos has recognized this error and called for reform in Louisiana that would bar predial servitudes of noncompetition from being recognized.<sup>185</sup> France, another civil law state, follows this approach and outright refuses to recognize predial servitudes of noncompetition because the benefit accrues to the owner of a particular establishment rather than the owner of an estate at any given time.<sup>186</sup> However, an absolute bar to the enforcement of a real right of noncompetition would be an incorrect interpretation of Louisiana law.

### *3. Certain Noncompetition Agreements Can Benefit the Dominant Estate*

An absolute bar to predial servitudes of noncompetition is too broad and heavy-handed because it ignores valid predial servitudes. There are circumstances under which a successor to property is almost certain to engage in the same profession as his predecessor.<sup>187</sup> In this situation, a predial servitude of noncompetition should benefit any future owner in conformity with article 647.

Consider a gas station, the construction of which requires extensive alteration to the property in the form of burying gas tanks and installing pumps in their distinctive rows. A future buyer could theoretically demolish the existing structures and build any new structures he desired, but it would be a costly endeavor to erase the improvements made by his predecessor. Rather, a person who purchases a gas station likely intends to make use of the improvements to operate the same sort of business as the property's previous owner. This reasoning applies to many instances of developed property, such as movie theaters or oil refineries.

Where any given future owner of the dominant estate is likely to engage in the same business as the contracting owner, a predial servitude of noncompetition benefits the dominant estate. The fifteenth owner of a

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185. See YIANNOPOULOS, *supra* note 20, § 6:5.

186. *Id.* (citing 3 PLANIOL & RIPERT, TRAITÉ PRATIQUE DE DROIT CIVIL FRANÇAIS 924 (2d ed. 1952)).

187. *Id.*

gas station benefits as much from a servitude preventing neighboring estates from selling gasoline as much as the first owner of the gas station did. As long as there are extensive modifications to a property tailored to a particular industry, predial servitudes of noncompetition can be created under the Louisiana Civil Code.<sup>188</sup>

Other civil law jurisdictions have recognized the validity of these special predial servitudes of noncompetition. Both Greek and German jurisprudence permit landowners to contract for predial servitudes of noncompetition when the dominant estate has been extensively modified to support a particular trade, but they do not allow these servitudes when the dominant estate can readily be used for other business activities.<sup>189</sup> In these countries the owner of a manufacturing plant or a gas station, for example, will be able to contract with neighbors for predial servitudes of noncompetition because his property has been permanently dedicated to a single trade.<sup>190</sup>

This compromise approach seems the most theoretically sound of the three options insofar as it recognizes predial servitudes of noncompetition only when a real benefit to a dominant estate is present. Importantly, this approach is not a suggestion for future law, but a more correct and full interpretation of the law as it currently stands; predial servitudes of noncompetition are necessarily restricted by the nature of predial servitudes. The current law, however, leaves unresolved policy concerns regarding noncompetition arrangements. A complete bar against predial servitudes of noncompetition is undesirable, but action should be taken to regulate these noncompetition contracts.

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188. Recognition of this sort of predial servitude allows one to make sense of the language in Louisiana Civil Code article 699 that identifies a restriction on the raising of buildings as a valid predial servitude apart from the traditional predial servitudes of view and light. Where a business requires extensive modifications of land or the raising of structures to operate, a prohibition on these erections or modifications will necessarily bar the owner from engaging in that business. Whether this sort of trade exclusion was contemplated at the time the article was penned is impossible to determine, but it provides a satisfying explanation of how a restriction on the raising of buildings can benefit a dominant estate apart from ensuring access to view and light.

189. See YIANNPOULOS, *supra* note 20, § 6:5.

190. *Id.* (citing Bundesgerichtshof [BGH] [Federal Court of Justice] July 6, 1939, 161 ENTSCHIEDUNGEN DES REICHSGERICHTS IN ZIVILSACHEN [RGZ] 90, 1939 (Ger.)) (involving a prohibition of the operation of a power station in competition with the power station on the dominant estate).

*C. Public Policy Problems with the Predial Servitude of Noncompetition*

Businesses will enter into these noncompetition arrangements for a variety of reasons, some of which are perfectly legitimate and worth preserving in the law.<sup>191</sup> It is also part of the modern legal spirit to allow

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191. For example, Louisiana Revised Statutes section 23:921 contemplates restrictive covenants between partners in business, buyers and sellers of a business's good will, employers and employees, and franchise owners and operators. Noncompetition arrangements protect against businesses' legitimate fear that they will waste time and energy to train their competitors or their competitor's employees or against the legitimate concern that previous owners might thwart the purchase of a brand by marketing themselves as the true successors to the brand and stealing customers away. In the context of land use restrictions, businesses have incentive to avoid selling assets or land to competitors or to those who will later sell or lease to competitors. Such was the case in *R & K Bluebonnet, Inc. v. Patout's of Baton Rouge, Inc.* and *Meadowcrest Center v. Tenet Health System Hospitals, Inc.* *R & K Bluebonnet, Inc. v. Patout's of Baton Rouge, Inc.*, 521 So. 2d 634, 635 (La. Ct. App. 1988); *Meadowcrest Ctr. v. Tenet Health Sys. Hosps.*, 902 So. 2d 512, 514 (La. Ct. App. 2005). It is possible that businesses will keep unused property out of commerce unless they have access to these noncompetition agreements as insurance in their sales. Just as reasonably, businesses have an interest in preserving a brand image after purchasing another business's goodwill. *See, e.g.*, LA. REV. STAT. § 23:921 (2017) (permitting certain noncompetition agreements in sales of a business's goodwill). This interest likely motivated the arrangement in *SPE FO Holdings, LLC v. Retif Oil & Fuel, LLC*, No. 07-3779, 2008 WL 754716, at \*1 (E.D. La. Mar. 19, 2008), wherein a buyer of assets sought assurance that the seller would allow the buyer to operate without competition from the seller's remaining local estates. As in land sales, prohibitions against noncompetition agreements in sales of business assets could stifle legitimate and healthy business deals. On the other hand, businesses also have a strong interest in shaping markets for easy exploitation, and it is often in the public's best interest to limit the extent to which businesses can pursue this goal. The interest in market manipulation is inherent to the very nature of a business as a revenue-generating activity, and the legal opposition to its unchecked pursuit can be observed in legislation, such as the Sherman Act, 15 U.S.C. § 1 and the following, designed to thwart creation of monopolies by unfair trade practices. Agreements founded only on this exploitive, monopolistic interest run contrary to public policy and are often unrecognized by courts, at least in the common law. *Dean Van Horn Consulting Assoc., Inc. v. Wold*, 395 N.W. 2d 405, 408–09 (Minn. Ct. App. 1986); LA. REV. STAT. § 23:921. Care should always be taken to balance protections for healthy business interests and restrictions on unhealthy market manipulations.

parties to contract as they see fit,<sup>192</sup> and care should be taken to protect this freedom wherever possible.

Barring predial servitudes of noncompetition could seriously impede the ability of companies to protect their interests. In the context of sales of land, where a business wishes to avoid selling excess property to a competitor, there is no effective contractual solution other than the predial servitude of noncompetition. The next best alternative for a business in this situation is to contract for a personal right of noncompetition, but these personal rights will not bind future owners or lessees on the property.<sup>193</sup> Because personal obligations lose their effectiveness after property is transferred or leased, they are inadequate insurance for a business looking to sell real estate without giving it to a competitor. Businesses purchasing assets from failing companies, as occurred in *Retif*, face similar problems because personal obligations imposed on a failing company are unlikely to survive the inevitable dispersal of assets.<sup>194</sup> Therefore, Louisiana should not legislate to ban the predial servitude of noncompetition as France has done; doing so would remove a vital tool that businesses use to protect their interests.<sup>195</sup>

However, there are good reasons to restrict predial servitudes of noncompetition.<sup>196</sup> Noncompetition agreements pose threats to the public

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192. LA. CIV. CODE art. 1971 (2017) (establishing that parties hold the freedom to contract for any object that is lawful, determinable, and possible). Notably, legislation will trump the freedom of contract, but it is clear that the default is a deference for the freedom of parties. *Id.*

193. *See, e.g., Winn-Dixie Stores, Inc. v. Dolgencorp, LLC*, 746 F.3d 1008, 1031 (11th Cir. 2014).

194. *See SPE FO Holdings*, 2008 WL 754716, at \*5 (denying summary judgment where a factual question existed as to whether the purchasers of property assumed a prior bankrupt owner's obligation towards the plaintiff in a noncompetition personal obligation).

195. YIANNOPOULOS, *supra* note 20, § 6.5.

196. The traditional concern is that employers can abuse noncompetition arrangements because employees who agree to the noncompetition are left bound to the business for their livelihoods. There are parallels between this employment by threat of contractually enforced unemployment and indentured servitude, which bound parties to work for another under penalty of prison sentences. Carey C. Lyon, *Oppress the Employee: Louisiana's Approach to Noncompetition Agreements*, 61 LA. L. REV. 605, 609 (2001). These arrangements can indefinitely tie a person to a particular labor by threat of poverty. *Bailey v. Alabama*, 219 U.S. 219, 244 (1911). The parties in an employment relationship burdened with such agreements are left in a severe power imbalance where an employee cannot afford to quit or be fired but the employer suffers no burden for discharging the employee. Carey C. Lyon, *Oppress the Employee: Louisiana's Approach to*



good by disrupting efficient markets and permitting the purchase of local monopolies. In an employment context, they can disrupt efficient labor markets by impeding the flow of labor to those parties to whom it would be most valuable.<sup>197</sup> In the case of predial servitudes, the arrangement can disrupt efficient land use by preventing future owners from using an estate to its full potential.<sup>198</sup> Even if the contracting owner of the servient estate never intended to use his land to compete with the dominant estate, the land becomes burdened for all future owners even if that is the best use of the property. Further, noncompetition agreements of all sorts offend traditional notions of fair competition in the market because they empower the wealthy to purchase monopolies either by tying up a local workforce<sup>199</sup> or, in the case of predial servitudes, a broad region of land.<sup>200</sup>

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*Noncompetition Agreements*, 61 LA. L. REV. 605, 610–11 (2001). This inequity is especially problematic when employees might have little initial bargaining power, such as when the contract is a prerequisite to employment. The power imbalance that warrants regulation of noncompetition agreements between employer and employee does not carry over to predial servitudes of noncompetition. *See* Louisiana Smoked Prods., Inc. v. Savoie's Sausage & Food Prods., Inc., 696 So. 2d 1373, 1378–81 (La. 1997) (holding that Louisiana's law prohibiting noncompetition agreements does not affect agreements between businesses because, among other things, the businesses are not in the unequal bargaining positions that the statute was meant to provide for). Nevertheless, agreements not to use land for competition carry their own policy issues.

197. *See* Christopher T. Wonnell, *The Contractual Disempowerment of Employees*, 46 STAN. L. REV. 87, 100–02 (1993) (discussing the theory of “efficient breach”). Efficient breach is the idea that, economically speaking, employees should rationally breach contracts to work for employers willing to compensate them enough to overcome the costs of breach; this breach ensures that labor is distributed to those who consider it most valuable. *Id.* Noncompetition agreements prevent this economic shuffling by shutting down the employee's freedom to move in the labor market.

198. *C.f.* Meadowcrest Ctr. v. Tenet Health Sys. Hosps., Inc., 902 So. 2d 512, 515 (La. Ct. App. 2005) (arguing that a predial servitude does not impinge on public policy when it removes land from commerce because legislation has made these arrangements part of the public policy on land ownership).

199. Gerald T. Laurie & David A. Harbeck, *Balancing Business Protection with Freedom to Work: A Review of Noncompete Agreements in Minnesota*, 23 WM. MITCHELL L. REV. 107, 117 (1997).

200. Allowing parties free reign to craft predial servitudes of noncompetition would permit businesses to effectively purchase regional monopolies and tie up land that could have been developed for fair market competition. It is conceivable that a business might approach neighboring businesses, engage them in separate trades, and purchase the agreement that their estates never compete with its own. Because many of these neighbors likely have no desire to engage in that industry,

Although the removal of the servient estate from commerce is cause for concern, the servient estate will not necessarily be bound forever. Predial servitudes are extinguished when the dominant estate is destroyed,<sup>201</sup> when both estates are owned by the same individual,<sup>202</sup> or when the dominant estate owner renounces the servitude in writing.<sup>203</sup> Predial servitudes are also extinguished once the benefit to the dominant estate ceases to exist, such as when the dominant estate ceases to be used for the trade protected by the servitude.<sup>204</sup>

On the other hand, these methods of extinction are not guarantees of any reasonable deadline, and they are inadequate checks on predial servitudes of noncompetition. The servient estates burdened with these servitudes are removed from a particular trade or industry indefinitely and to the detriment of free market competition. In light of these concerns, Louisiana's recognition of predial servitudes of noncompetition, even in limited circumstances of significant land alteration, should be restricted. Personal obligations of noncompetition between parties in certain business relationships are limited in duration and scope to prevent permanent loss

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they receive payment for effectively no personal costs. The outcome is complete control over local consumers because the land has been made worthless for potential competitors. The expenses might be prohibitive for most businesses, but the mere possibility that land could be tied up in this manner to benefit a single business is a cause for alarm. This outcome impinges on the Louisiana public policy in favor of free use of land as well as the American tradition of free-market competition.

201. LA. CIV. CODE art. 751 (2017).

202. *Id.* art. 765.

203. *Id.* art. 771.

204. *Swayze v. State Dep't of Transp. & Dev.*, 793 So. 2d 1278, 1280 (La. Ct. App. 2001), *writ denied*, 808 So. 2d 342 (La. 2002) (determining that a servitude for a right of passage ceased to benefit a railroad when it permanently shut down the rail line that passed through the servient estate; the end of benefits terminated the servitude). This case concerned a personal servitude acquired by a railroad, but the court applied article 647 by analogy. *Id.* The application of article 647 to this case was perfectly acceptable because article 645 establishes that personal servitudes are governed by predial servitude articles where applicable. Just as the railroad's personal servitude expired with the railroad's closure of the rail line, a predial servitude of noncompetition will expire when the dominant estate is entirely removed from the industry that was in place when the parties created the servitude. This expiration occurs because the current and future owners of the dominant estate will no longer extract any benefit from the arrangement once the trade or business is abandoned. *See id.*

of livelihood;<sup>205</sup> similar restrictions should be established for predial servitudes of noncompetition to prevent the permanent limitation of land.

As things stand, Louisiana courts are misapplying the law of predial servitudes.<sup>206</sup> Moreover, the more faithful interpretation of the law fails to address public policy concerns regarding abuse of predial servitudes to create monopolies and the potentially perpetual removal of property from commerce. Legislative action must be taken to address these problems.

#### IV. A LEGISLATIVE SOLUTION

Louisiana courts have been incorrect to zealously validate predial servitudes of noncompetition. The correct approach under the law is to permit predial servitudes of noncompetition when the dominant estate has been permanently altered and dedicated to a particular industry or trade.<sup>207</sup> Legislative action should be taken both to clarify the law on predial servitudes of noncompetition and to reasonably restrict these arrangements in the best interests of society.

Legislative action should take care to balance the interests of businesses in receiving adequate insurance against competition with the interests of the public in avoiding monopolies and in having access to unburdened land. The Louisiana approach to traditional noncompetition agreements is to allow such arrangements only when there is a particular relationship between parties, when the arrangement is two years long or less, and when the geographic scope is limited.<sup>208</sup> This approach provides a good model from which to create regulation for real rights of noncompetition. The legislation governing predial servitudes of noncompetition should place qualifiers on party relationships, duration of the servitude, and the specificity of the limitation. The legislature should also take this opportunity to correct court misapplication of the principle of utility in predial servitudes of noncompetition. To make this correction, the new legislation should include an explicit requirement that the dominant estate be permanently dedicated to a trade or business.<sup>209</sup>

##### *A. Prohibition of Freestanding Noncompetition Servitudes*

First, the legislature should permit predial servitudes of noncompetition only as incidental obligations in contracts for the sale of land or business assets. This rule will limit the number of properties that can be removed from

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205. LA. REV. STAT. § 23:921 (2017).

206. *See supra* Part III.B.

207. *See discussion supra* Part III.A.4.

208. LA. REV. STAT. § 23:921.

209. *See discussion supra* Part III.A.3–4.

commerce while allowing businesses to protect themselves as they dispose of excess land or acquire business assets. Businesses, such as the hospital in *Meadowcrest*<sup>210</sup> or the restaurant in *R & K Bluebonnet*,<sup>211</sup> can sell their property with the assurance that they will not be immediately surrendering their land to new competition. Meanwhile, as occurred in *Retif*,<sup>212</sup> businesses that purchase assets from others in an attempt to enter new markets can negotiate concessions that the seller will not use nearby estates to smother the burgeoning business. These arrangements are already permitted as personal obligations,<sup>213</sup> but validating them as predial servitudes allows the businesses to protect themselves against third-party future owners that would not otherwise be bound to the arrangement.

It is crucial that the noncompetition arrangement be an incidental, rather than core component, of the contracts that establish them. This limitation prohibits businesses from creating monopolies as they might do if permitted to negotiate freely with their neighbors for predial servitudes of noncompetition.<sup>214</sup> The need for this provision is clear when considering the ease with which a business might extract these servitudes from his neighbors outside an act of sale. What homeowner would hesitate to accept money for the promise that his home never be a gas station? What grocer would turn down a cash windfall for the promise not to become an auto repair shop? It is in the public interest to prevent this abuse while preserving the business interests associated with sales of land and business assets.

#### *B. Limited Duration of the Servitude*

Second, the legislature should limit the duration of predial servitudes of noncompetition by establishing a maximum enforceable term. The term must be long enough to be meaningful and to protect the interests behind the arrangement, but the term must also be brief enough to ensure that property is returned to free commercial use in a reasonable time. The exact term to be set should be investigated thoroughly with input from business

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210. *Meadowcrest Ctr. v. Tenet Health Sys. Hosps., Inc.*, 902 So. 2d 512, 514 (La. Ct. App. 2005); *see discussion supra* Part II.A.

211. *R & K Bluebonnet, Inc. v. Patout's of Baton Rouge, Inc.*, 521 So. 2d 634, 635 (La. Ct. App. 1988); *see discussion supra* Part II.A.

212. *Textron Fin. Corp. v. Retif Oil & Fuel LLC*, 342 F. App'x 29, 34 (5th Cir. 2009); *see supra* Part II.A.

213. *Textron*, 342 F. App'x at 33.

214. *See supra* Part III.B.

owners.<sup>215</sup> The term might also vary between contracts for the sale of real estate and the sale of ordinary assets because the business interests are different in these cases.<sup>216</sup>

The two-year statutory term for personal obligations of noncompetition<sup>217</sup> is likely too short for meaningful predial servitudes. The appeal of real rights is that they automatically bind future owners;<sup>218</sup> so the term should be long enough to see the property change hands. Ten years seems a satisfactory maximum because it allows a business ample opportunity to enjoy its purchase but returns property to commerce in less than a single generation.<sup>219</sup> A term approaching several decades seems excessive as successive parties who had no hand in the original contract and who might have been yet unborn at its inception would nevertheless find themselves barred from free commercial use of their land.

*C. Specificity of Prohibited Trade: No General Noncompetition Agreements*

Third, the legislature should require these arrangements be written to prohibit participation in particular industries or trades rather than to prohibit generic “competition” with the dominant estate. A predial servitude of noncompetition will cease to benefit the dominant estate once the trade-specific improvements are removed from the dominant estate,<sup>220</sup> and the predial servitude will necessarily expire with the loss of the benefit

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215. This demographic has the greatest interest both in securing long-term protections for their business transactions and in preserving their right to freely leverage property for commerce. Therefore, recommendations from entrepreneurs and established business owners should greatly assist legislators in setting the appropriate term.

216. Respectively, the interests are in avoiding the creation of competition when selling land and in purchasing time to establish a business in an area formerly occupied by the seller of the assets. In one case the dominant-estate holders want assurance that they can sell their excess property without creating difficulty for their businesses. In the other, the dominant-estate holders want assurance that they will not be cheated by the seller, who likely retains valuable customer contacts and market information for the area, all of which could be used to steal back business from the buyer.

217. LA. REV. STAT. § 23:921 (2017).

218. See *supra* Part I.

219. This suggested duration is based entirely on speculation. The term set by the legislature could be longer or shorter, and it should be set after thoughtful consideration and discussion with potentially affected parties.

220. See *supra* Part III.B.3.

to the dominant estate.<sup>221</sup> Absent proactive legislation, however, a dominant estate owner might simply swap out the modifications on the dominant estate and attempt to pursue a new trade while enforcing the old, broadly worded servitude of noncompetition.<sup>222</sup> If such retooling of a dominant estate occurs, Louisiana courts might recognize that the period between the old and new modifications to the dominant estate left the dominant estate without benefit from the predial servitude and caused the servitude to collapse, but there is a risk that the courts would hold that the new construction merely altered the nature of the servitude and the restriction on the servient estate. The latter outcome is not only legally questionable but also unreasonable to the servient estate owner who might be forced out of a particular business that was once permitted under his servitude contract. Certainly, there is no harm in making an explicit rule to remove future ambiguity or abuse of the law.

#### *D. Clarification of Current Law*

Finally, the legislature should take the opportunity to clarify the law of predial servitudes in Louisiana by explicitly including a requirement that the dominant estate be permanently dedicated to a particular trade or business. Louisiana courts have misinterpreted the law of predial servitudes because they have not scrutinized predial servitudes of noncompetition for benefits to the dominant estate. Because these benefits can only exist when any future owner of the dominant estate is likely to be committed to the same trade as his predecessors, the law as it stands today can support predial servitudes of noncompetition only when the dominant estate has been modified in a way that dedicates it to a particular trade. Adding this requirement to the legislation should not change the law in theory, but it will affect a change in legal practice because courts so far have ignored the law on this issue.

Application of this rule will require factual determinations concerning the permanent dedication of land. In at least one German case, for example, the existence of a predial servitude depended heavily upon whether a bakery was fully equipped and likely to be used as a bakery by future owners or else was left generic enough to be used for other industry.<sup>223</sup> This factor places new burdens on the Louisiana courts, which

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221. LA. CIV. CODE art. 647 (2017).

222. In this way, a dominant-estate holder might even seek to shut down an established business on the servient estate.

223. YIANNPOULOS, *supra* note 20, § 6:5 (citing Bundesgerichtshof [BGH] [Federal Court of Justice] Aug. 9, 1957, 10 NEUE JURISTISCHE WOCHENSCHRIFT [NJW] 1765 (Ger.)).

will need to examine carefully the material developments on lands subject to potential predial servitudes. Parties will also be burdened by some uncertainty regarding their own estates, but this uncertainty should fade as jurisprudential tests and guidelines are developed.

Arguably, the French approach—complete rejection of any predial servitude of noncompetition—is preferable for the simplicity it offers courts and parties. However, factual determinations are already a key part of Louisiana property law,<sup>224</sup> and this hurdle should not be insurmountable for Louisiana courts.<sup>225</sup> Subjective evaluations of property work perfectly well in Louisiana, and the courts will likely develop factor tests to decrease uncertainty in contracts. Moreover, the French approach sacrifices all of the benefits that regulated predial servitudes of noncompetition can bring as insurance in sales of real estate and business assets.

#### *E. The Proposed Legislation*

This act should be placed in the Revised Statutes rather than the Civil Code, primarily because of the specificity of the new law. An approximate model of the statute could be summarized thusly:

A. All predial servitudes that purport to restrain the servient estate from participation in a trade or business in competition with the dominant estate shall be considered absolutely null unless they fulfill all of the criteria in Section B of this statute.

B. Predial servitudes in restriction of trade shall be permitted when: (1) the servitude is made between buyers and sellers of land or business assets; (2) the servitude is subject to a resolutory term no greater than ten years; (3) the trade or business of the dominant estate from which the servient is to refrain is specifically described in the contract; and (4) the dominant estate has been permanently dedicated to a particular trade or business, such as a railroad station, gas station, or refinery.

C. For purposes of Section B, a land has been permanently dedicated to a particular trade or business when, because of modifications or improvements to the property, it is more likely

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224. See, e.g., LA. CIV. CODE art. 466 (requiring courts to determine whether a thing attached to a building “serves to complete a building of the same general type” or whether an object is attached to a building such that it cannot be detached without “substantial damage”).

225. For example, classifying property as immovable or movable is a crucial part of Louisiana property, yet it is a subjective court determination of fact. See, e.g., *id.*

than not that a randomly selected future owner will have purchased the land to practice the same trade or business as a randomly selected prior owner since the time of the dedication.

By adopting this legislation, Louisiana will protect the public interest while continuing to recognize predial servitudes of noncompetition that offer a genuine benefit to their dominant estates. This legislation is the ideal solution that protects business interests, the integrity of the civil law, and the public welfare in the state. It will also remove remaining ambiguity regarding predial servitudes of noncompetition in the state.<sup>226</sup>

Of course, if businesses wish to create noncompetition arrangements outside the new legislation, they are free to do so. These arrangements will simply create personal obligations, just as the arrangement in *Retif* did.<sup>227</sup> The contract will not be binding on the future owners of an estate, but it will be binding on the parties to the contract. These personal obligations should be enough to satisfy business interests in some situations, and it reflects what Louisiana has already done with noncompetition clauses embedded in lease agreements.<sup>228</sup>

#### CONCLUSION

Louisiana courts have been overzealously validating real rights of noncompetition in the form of predial servitudes. The law as written does permit predial servitudes of noncompetition, but only when the dominant estate is so modified and improved to suit a particular trade that a randomly selected future owner will likely be engaged in the same business as the owner who contracted for the servitude. Unfortunately, unregulated validation of even those servitudes that the law currently permits will introduce public policy concerns because businesses can abuse the law to purchase monopolies. The ideal solution is to clarify the law for courts while also regulating predial servitudes of noncompetition through legislation so that businesses can pursue legitimate interests without creating the risk of local monopolies.

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226. This Comment takes the position that predial servitudes of noncompetition are already limited by law to cases where the land has been permanently dedicated to a particular trade, but the courts could benefit from legislation that clarifies this requirement.

227. *Textron Fin. Corp. v. Retif Oil & Fuel LLC*, 342 F. App'x 29, 33 (5th Cir. 2009).

228. *Winn-Dixie Stores, Inc. v. Dolgencorp, LLC*, 746 F.3d 1008, 1030 (11th Cir. 2014).



Adoption of this legislative solution will mean that certain businesses, those that do not require extensive modification of the land to operate, will be rightfully unable to pursue real rights of noncompetition where once a Louisiana court might have permitted it. However, the law does not leave these businesses totally without remedy; all businesses can contract for personal obligations that restrict particular persons from using land in competition with their businesses. Real rights of noncompetition will remain the exceptions to public policy that Louisiana has always maintained and will be available only when there is a true benefit to an estate.

*Alex Hotard\**

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